IN THE

SUPREME COURT OF THE UNITED STATES

No. 76-3981

THE CITIZENS AND SOUTHERN NATIONAL BANK,
Petitioner,

vs.

NICK BOUGAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Court of Appeals of the State of Georgia

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Petitioner, The Citizens and Southern National Bank, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Georgia (Docket No. 51622) entered in this proceeding on May 6, 1976.

OPINIONS BELOW

The opinion of the Georgia Court of Appeals, is reported in 138 Ga. App. 706 (1976) and appears in the Appendix, *infra*, pp. A-1 to A-4. The order of the State Court of DeKalb County, Georgia, is unreported and appears in the Appendix, *infra*, p. A-5). The judgment of the Court of Appeals, and the orders denying rehearing, petition for certiorari and reconsideration appear in the Appendix, *infra*, pp. A-6—A-9.

JURISDICTION

The judgment of the Georgia Court of Appeals was entered on May 6, 1976, affirming the order of the State Court of DeKalb County dated August 22, 1975. The Court of Appeals denied a timely motion for rehearing on May 21, 1976. Thereafter, on June 30, 1976, the Georgia Supreme Court denied a petition for certiorari, one Justice dissenting; a motion for reconsideration was finally denied by the Supreme Court on July 15, 1975, two Justices dissenting. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3) (1970).

QUESTION PRESENTED

Whether, for purposes of laying venue in transitory[1] actions prosecuted in the Georgia state courts, 12 U.S.C. §94 requires that Petitioner, a national banking association, be sued only in Chatham County, Georgia, the county in which its charter[2] was issued?

STATUTE INVOLVED

12 U.S.C. §94 (1970) provides:

> "Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

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[1] The "local action" exception to 12 U.S.C. §94 is discussed n. 16, *infra*.

[2] The "charter" county is that particular county specified in the national bank's organization certificate. *See* 12 U.S.C. §22 (1970).

STATEMENT OF THE CASE

This case, involving a suit for alleged unlawful redemption and conversion of a particular savings bond, was filed in the State Court of DeKalb County, Georgia, on June 30, 1975, by Nick Bougas (hereinafter "Bougas") against The Citizens and Southern National Bank (hereinafter "C&S"), a national banking association chartered in Chatham County, Georgia, under the laws of the United States. C&S duly answered and concurrently filed a motion to dismiss the complaint, showing as grounds therefor that 12 U.S.C. §94 lays exclusive venue, in transitory actions against C&S, in Chatham County, Georgia. R. 11-16. On August 22, 1975, the C&S motion to dismiss was denied without discussion of the 12 U.S.C. §94 privilege. R. 17; App. A-5.

On appeal to the Georgia Court of Appeals,[3] C&S reiterated the 12 U.S.C. §94 mandate restricting venue in transitory suits against a national bank to the county in which its charter was issued.[4] In its decision of May 6, 1976, the Court of Appeals recognized both the applicability of 12 U.S.C. §94 to C&S as an "association under this chapter" (App. A-2), and that 12 U.S.C. §94 posits mandatory venue in suits against national banking associations. App. A-2. Furthermore, the Court of Appeals implicitly acknowledged that the charter of C&S was issued in Chatham County, Georgia (App. A-1, A-4; *see* R. 11-13), and that a national banking association is "established" within the meaning of 12 U.S.C. §94 only in the federal district

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[3] C&S perfected its interlocutory appeal by duly obtaining a certificate for immediate review from the trial court (R. 18) and an order granting interlocutory appeal from the Court of Appeals (R. 19); a notice of appeal was filed in the State Court of DeKalb County on September 30, 1975. R. 1-2.

[4] The C&S arguments are set forth in the "Brief of Appellant," which is included in the certified record herein but is not separately paginated as part of the record.

encompassing the county specified in its charter and not in whatever district it may do business. App. A-2, A-3, A-4.

However, although cognizant of the significant federal and state authority substantiating that "established" and "located" in 12 U.S.C. §94 are functionally synonymous words designating a single federal district and state county, respectively, in which transitory actions against national banks can be prosecuted (*see* App. A-2—A-3), the Court of Appeals dichotomized these two words and held:

> "We conclude that when a national bank, 'established' in this state, operates and maintains in counties other than the county of its principal office, branches at which it conducts its general banking business, the corporation is present at all times [in] each such branch and is 'located' therein within the meaning of this Act of Congress. Thus, it is subject to suit in a state court in such county, otherwise having jurisdiction, just as it is in the county wherein its principal office is located," App. A-4.

The C&S motion for rehearing in the Court of Appeals,[5] the petition for certiorari in the Georgia Supreme Court and the motion for reconsideration were substantially based upon the erroneous interpretation of 12 U.S.C. §94 by the Court of Appeals and were denied without opinion.

Petitioner seeks review of the May 6, 1976 judgment of the Georgia Court of Appeals, the highest appellate court which has ruled on the federal question involved herein.

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[5] The filing of a motion for rehearing is a statutory prerequisite to petitioning for certiorari in the Georgia Supreme Court. Ga. Code Ann. §24-4536(h).

REASONS FOR GRANTING THE WRIT

This case presents the singular question of where a national bank is "located" within the meaning of 12 U.S.C. §94 for purposes of defending transitory suits in state courts. This particular question can only arise in the state courts[6] and herein is untainted by any factual issues concerning "waiver" of the venue privilege.[7]

However, the very simplicity of the question should not obfuscate its import. The judgment of the Court of Appeals, which truncated the national bank venue privilege, is prototypical of the persistent assaults on 12 U.S.C. § 94 in which modern courts are presently indulging with disquieting frequency. This very year, this Court has already rejected two other purported

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[6] 12 U.S.C. §94 independently regulates venue in federal courts, providing that suits against national banking associations "may be had in any district or Territorial court of the United States held within the district in which such association may be established . . . ." Although several federal courts consider the words "established" and "located" to be functionally interchangeable, the interpretative holding of such courts, as federal courts, must be restricted to the meaning of the word "established" in 12 U.S.C. §94. *See e.g., United States National Bank v. Hill*, 434 F.2d 1019 (9th Cir. 1970); *Northside Iron & Metal Co. v. Dobson and Johnson, Inc.*, 480 F.2d 798 (5th Cir. 1973); *McClung v. La Salle National Bank*, 387 F. Supp. 977 (S.D. Iowa 1975).

[7] The Court of Appeals commented:

> "As to whether a national bank is 'located' in a county simply by setting up a branch to conduct general bank business, therein, it seems clear that it has manifested an intent to be found in that jurisdiction for purposes of suits arising out of any business conducted there." App. A-4.

Although this observation appears to broach the issue of waiver, it bears no relationship to the actual holding (*see* p. 4, *supra;* App. A-4) of the Court and is, in fact, tantamount to obiter dictum.

Moreover, the concept of waiver suggested by the Court of Appeals is independent of the facts of a particular case and is reviewable on appeal as a question of law. *See* n. 10, *infra.*

limitations on the scope of 12 U.S.C. § 94;[8] Petitioner respectfully submits that this is the expedient and opportune occasion for the Court to prevent further encroachment upon, and erosion of, the traditional mandate of that venue statute.

A. **The Interpretation of the Word "located" in 12 U.S.C. § 94 Is the Subject of Irresolute Conflict Among the States.**

Although the lower federal courts are in unanimous accord that a national bank is "established" under 12 U.S.C. § 94 only in that federal district in which its charter was issued,[9] an unfortunate variety of geographical referents has been associated with the word "located" by the state judiciary. Three different theories manifest this contemporary discord:

1. Certain courts have held that the words "established" and "located" are functionally synonymous and, following the federal interpretation of "established", have concluded that, absent intentional waiver, transitory suits in state courts can only be brought in the county in which the charter of the national bank was issued. *Gregor J. Schaefer Sons, Inc. v. Watson*, 26 A.D. 2d 659, 272 N.Y.Supp. 2d 790 (1966); *Prince v. Franklin National Bank*, 62 Misc. 2d 855, 310 N.Y. Supp. 2d 390 (1970); *Ebeling v. Continental Illinois National Bank & Trust Co.*, 272 Cal. App. 2d 724, 77 Cal. Rptr. 612 (1969).

2. A second theory has emerged which is premised not upon a purely interpretative analysis of the word "located", but rather

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[8] *See, National Bank of North America v. Associates of Obstetrics and Female Surgery, Inc.*, — U.S. —, 96 S.Ct. 1632 (1976); *Radzanower v. Touche Ross & Co.*, — U.S. —, 96 S.Ct. 1989 (1976).

[9] *See, e.g., Leonardi v. Chase National Bank*, 81 F.2d 19 (2d Cir.), *cert. denied*, 298 U.S. 677 (1936); *Northside Iron & Metal Co. v. Dobson and Johnson, Inc., supra.*

upon a notion of presumptive "waiver." The judicial adherents to this theory, while paying superficial homage to the general principle that a national bank is "located" only in the county in which its charter was issued, hypostasize a waiver of 12 U.S.C. § 94 by the creation of a branch bank, concluding therefrom that a national bank can be sued in any county in which it operates a branch bank as to actions arising out of its banking activity at such branch. *Lapinsohn v. Lewis Charles, Inc.*, 212 Pa. Super. 185, 240 A.2d 90, *cert. denied* 393 U.S. 952 (1968); *Security Mills of Asheville, Inc. v. Wachovia Bank & Trust Co.*, 281 N.C. 525, 189 S.E. 2d 266 (1972) (alternative holding.)[10]

3. The extreme position espoused by some courts rejects the synonymity of "established" and "located", and concludes that a national bank is "located" in any county in which it operates and maintains branches conducting general banking business, notwithstanding that it may be "established" only in its charter county. *Security Mills of Asheville, Inc. v. Wachovia Bank and Trust Co., supra; Holson v. Gosnell*, 264 S.C. 619, 216 S.E.2d 539 (1975) *cert. denied*, 423 U.S. 1048 (1976); *Central Bank v. Superior Court*, 30 Cal. App. 3d 962, 106 Cal. Rptr. 912 (1973).[11]

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[10] The waiver is "presumptive" because it automatically ensues from the creation of a branch bank without regard to the voluntary intention of the national bank. Thus alienated from the facts of each particular case, the theoretical legitimacy of this type of waiver is actually a question of law subject to review as such on appeal.

A variation of this theory postulates a "waiver" of the 12 U.S.C. §94 venue privilege as to actions arising out of any business conducted in the county in which suit is brought, whether or not branch banking is conducted in that county. *See e.g., Vann v. First National Bank*, 324 So.2d 94 (Fla. App. 1976).

[11] The Georgia Court of Appeals apparently subscribes to this last variation. *See* p. 4, *supra;* App. A-4.

As the "waiver" theory indicates, the modern trend of some courts is to achieve the net effect of permitting suits against national banks in most state counties without literal offense to the language and legislative history of 12 U.S.C. § 94. However, the practical result of this theory is functionally indistinguishable from that entailed by the extreme position that national banks are "located" in all counties wherein they operate branch banks, any differences between these theories being merely semantic ones.

Petitioner submits that this tripartite disharmony, thus far involving few states, can only become increasingly aggravated as other states consider the meaning of "located" in 12 U.S.C. § 94. The interpretative dialectic shows no signs of abating and can only be finally resolved by a determinative ruling of this Court.

B. The Court of Appeals' Interpretation of "located" Conflicts With Prior Decisions of This Court.

After superficial analysis, the Court of Appeals held that C&S, while "established" only in one federal district, is "located" in all counties wherein it operates and maintains branches conducting general bank business. App. A-4. Not only is this conclusion offensive to the purpose and the legislative history of 12 U.S.C. § 94,[12] but it also contravenes prior decisions of this Court. The most expansive of such decisions is the recent and oft-cited *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963). In *Langdeau*, two national banks chartered in Dallas County, Texas, were sued in Travis County in accordance with lenient state venue provisions. The Texas Supreme Court rejected those banks' 12 U.S.C. § 94 defense on the alternative grounds that 12 U.S.C. § 94 was "permissive" or

[12] Discussed, §§ D and E, *infra*.

that it had been impliedly repealed.[13] Reversing the Texas Supreme Court, this Court held that 12 U.S.C. § 94 "must be given a mandatory reading," 371 U.S., at 562, and is "fully effective and must be recognized when [it is] duly raised." *Id.*, at 567. In rejecting the argument that 12 U.S.C. § 94 was "permissive," the Court noted:

> "We would not lightly conclude that a congressional enactment has no purpose or function. We must strive to give appropriate meaning to each of the provisions of Title 12 and its predecessors. . . . Appellee, however, would have us hold that any state court could entertain a suit against a national bank as long as state jurisdictional and venue requirements were otherwise satisfied. *Such a ruling, of course, would render altogether meaningless a congressional enactment permitting suit to be brought in the bank's home county*. This we are unwilling to do, particularly in light of the history of § 57. . . .
>
> All of the cases in this Court which have touched upon the issue here are in accord with our conclusion that national banks may be sued only in those state courts in *the* county where the banks are located." *Id.*, at 560-561 (emphasis added).

Langdeau evidences this Court's continuing affirmation that the word "located" in 12 U.S.C. § 94 designates *the* county of suit as *the home county*. *See First National Bank v. Morgan*, 132 U.S. 141 (1889). The phrase "home county" can have no other referent than the county in which the national bank was chartered; this fact implicitly entails the conclusion that a national bank cannot also be sued in any county wherein it operates branch banks. The *Langdeau* opinion, having issued some thirty years after the initiation of multi-county national bank branch-

[13] *Langdeau v. Republic National Bank*, 161 Tex. 349, 341 S.W. 2d 161 (1960), *rev'd sub nom. Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963).

ing,[14] cannot be facilely dismissed as quaint nineteenth century obsolescence.[15]

While there are two commonly acknowledged limitations on the scope of 12 U.S.C. § 94, neither is relevant to the present case.[16] Furthermore, this Court has never countenanced interference with 12 U.S.C. § 94 for any state "policy" reasons; it is solely "[t]he right of Congress to determine to what extent a state court shall be permitted to entertain actions against national banks, and how far these institutions shall be subject to state control." . . . *Van Reed v. People's National Bank*, 198 U.S. 554, 557 (1905). This congressional prerogative precludes, as a method of statutory construction, the Court of Appeals' effort to interpret 12 U.S.C. §94 "in harmony with the laws of venue of this state." App. A-4. *Van Reed* implicitly postulates, as a matter of basic federalism, that the harmony of federal and state statutes encompassing similar subject matter is irrelevant and that the state judiciary is neither empowered to arbitrate disparities between such statutes according to their supposed relative merits, nor authorized to reformulate federal statutes in accordance with

[14] The McFadden Act of 1927 first permitted a national bank to establish branches within its charter location. Act of February 25, 1927, ch. 191 §7, 44 Stat. 1228, as amended, 12 U.S.C. §36 (1970). In 1933, national banks were effectively authorized to engage in multi-county branch banking. Act of June 16, 1933, ch. 89, §23, 48 Stat. 189, 190, as amended, 12 U.S.C. §36 (1970).

[15] A common attack on the restrictive interpretation of 12 U.S.C. §94 is based upon the antiquity and alleged irrelevance of that statute in the twentieth century. *See, e.g., Holson v. Gosnell, supra*, 264 S.C. at 620, 216 S.E. 2d at 540.

[16] The first limitation, restricting the applicability of 12 U.S.C. §94 to transitory actions, was initially validated in *Casey v. Adams*, 102 U.S. 66 (1880) where the Court noted:

> "Local actions are in the nature of suits *in rem*, and are to be prosecuted where the thing on which they are founded is situated. To give the act [the predecessor to 12 U.S.C. §94] of Congress the construction now contended for would be in effect to declare that a national bank *could not be sued at all in a local action where the thing about which the suit was brought was not in the judicial district of the United States within which the bank was located.*" *Id.*, at 68 (emphasis added).

its own normative philosophy; "such a situation is a matter for Congress to consider." *Mercantile National Bank v. Langdeau, supra*, 371 U.S. at 563.

In short, this Court has repeatedly enunciated and consistently respected the restricted venue of 12 U.S.C. § 94, and has never sanctioned efforts to limit its effect for reasons of inconvenience to non-national bank litigants or for any other putatively desirable purposes. *See, Michigan National Bank v. Robertson*, 372 U.S. 591 (1963).

C. **The Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Authoritatively Settled by This Court.**

Notwithstanding implicit recognition that transitory suits against national banks can only be prosecuted in a single county, this Court has never explicitly defined the meaning of the word

The *Casey* exception is nothing more than a logical incident of 12 U.S.C. §94; having specifically enacted a statute authorizing suits against national banking associations in both federal and state courts, Congress could hardly have intended its venue provision to completely preclude certain suits altogether. However meritorious or justifiable the *Casey* exception may be, it is immaterial to the resolution of this case; the Court of Appeals did not deem it necessary to consider how an action for conversion can remotely qualify as a "local" action.

The second limitation is not strictly an exception to the applicability or scope of 12 U.S.C. §94, but merely an exposition of the well-settled principle that 12 U.S.C. §94 venue, being a privilege, can be voluntarily waived if not asserted in a timely fashion. *First National Bank v. Morgan, supra*. The complexities of waiver are myriad, but need not be considered here since the Court of Appeals, while commenting on waiver, did not designate this concept as the basis for its holding. *See* n. 7, *supra*. Moreover, the recognized waiver limitation involves waiver under the facts of a particular case, and is thus quite different from the "presumptive" waiver discussed n. 10, *supra*.

"located" in 12 U.S.C. § 94. In *Mercantile National Bank v. Langdeau, supra,* the Court was not called upon to resolve any potential dichotomy between "established" and "located" since neither of the national banks therein engaged in multi-county operations and each was thus "established" and "located" in a single county. Therefore, the questions of presumptive waiver and the geographical referent of "located" remain undecided.

The federal question at issue, measured by any standard of importance, is undeniably a crucial one. As previously noted,[17] the state courts have long been floundering in the morass of 12 U.S.C. § 94, and the meaning of "located" has been productive of much confusion. The issue here, although a narrow one, is indisputably "beyond the academic or the episodic," *Rice v. Sioux City Cemetery,* 349 U.S. 70, 74 (1955); cases turning on the interpretation of the word "located" in 12 U.S.C. § 94 have proliferated in the state appellate courts,[18] and these appellate cases undoubtedly reflect even greater activity at the significant but unreported trial court level.

The Court this year granted certiorari in *Radzanower v. Touche Ross & Co., supra,* to resolve a dispute between the Second and Ninth Circuits and the Third Circuit[19] on the question of whether the provisions of 12 U.S.C. § 94 were impliedly repealed by the venue sections of the Securities Exchange Act. By its decision in *Radzanower,* this Court manifested concern about the integrity and contemporary viability of 12 U.S.C. § 94. Yet *Radzanower* dealt only with federal securities actions against national banks, a "narrow and infrequent category" of litiga-

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[17] *See* §A., *supra.*

[18] *See* cases discussed pp. 6-8, *supra.*

[19] *See, Bruns, Nordeman & Co. v. American National Bank and Trust Co.,* 394 F.2d 300 (2d Cir.), *cert. denied,* 393 U.S. 855 (1968); *United States National Bank v. Hill, supra; Ronson Corp. v. Liquifin Aktiengesellschaft,* 483 F.2d 852 (3d Cir. 1973).

tion. *Id.,* 96 S.Ct., at 1994. On the other hand, upon the interpretation of the word "located" in 12 U.S.C. § 94 depends the venue of thousands of transitory actions brought against national banking associations in a multitude of state courts. This is, of course, not to demean the importance of *Radzanower,* but to emphasize the comparative impact which 12 U.S.C. § 94 has upon suits brought against national banks in state courts and the relative importance of an immediate and definitive decision to reconcile the unfortunate melange of rationales underlying the various interpretations of "located".

Most importantly, due regard must be accorded to the policy of Title 12 that "[n]ational banks are quasi-public institutions, and for the purpose for which they are instituted are national in their character." *Van Reed v. People's National Bank, supra,* 198 U.S. at 557. It is axiomatic that disparate treatment of national banking associations in different states is completely and inalterably inconsistent with the implicit congressional purpose to ensure uniform treatment of national banking associations throughout the entire country. Such uniformity is presently being thwarted with respect to venue, one of the privileges most fundamental to the federal judicial system. There is a pronounced anomaly when a New York national bank can be sued only in the county wherein it was chartered, a Georgia national bank can be sued in all counties in which it maintains branches, and a Pennsylvania national bank can be sued in all counties in which it maintains branches, but only as to actions arising out of business conducted at such branches. It is peculiarly within the province of this Court to resolve such anomalies affecting important rights of federally-chartered institutions whose amenity to state control should be, and heretofore has been, determined by federal law and not by the laws of the several states.

D. **The Court of Appeals Interpretation of "located" Is Antithetical to the Congressional Purpose Underlying 12 U.S.C. §94.**

This Court has consistently reiterated that 12 U.S.C. §94 was "prescribed for the convenience of those [national banking] institutions, and to prevent interruption in their business that might result from their books being sent to distant counties in obedience to process from state courts." *First National Bank v. Morgan, supra,* 132 U.S. at 145. The policy recognized by *Morgan* in 1889 has remained fully effective notwithstanding progressively modernized systems of communication and transportation and incessant charges of archaism.[20] *See Mercantile National Bank v. Langdeau, supra,* 371 U.S. at 561-562, n. 12; *Radzanower v. Touche Ross & Co., supra,* 96 S.Ct., at 1994.

The proposition that a national bank can be "located" in any county wherein it conducts branch banking, undermines this congressional purpose by fostering inconvenience to national banks and encouraging interruption in their business. Such a result is typified by this very case. The relevant transactions occurred in Chatham County, Georgia; all of the business records and documentation, and each C&S employee who has knowledge of the facts, are located or domiciled in Chatham County. The prosecution of this case in DeKalb County, Georgia will undoubtedly impose undue burden, expense and inconvenience upon C&S, all to the benefit and expedience of Bougas, and all in untenable disregard of the underlying purpose of 12 U.S.C. §94.

The preservation of this congressional solicitude for the convenience of national banks is no less important when judged by the realities of contemporary national bank operations. National banks are forced into multi-county operations, if only for the

[20] *See* n. 15, *supra.*

purposes of adequately competing with state-chartered banks. Accordingly, this Court's repeated declarations on the "mandatory" nature of 12 U.S.C. §94[21] are of small avail if this mandate is without substance and is easily circumvented by the expedient of interpreting the word "located" to encompass, for all practical purposes, all counties in which a national bank does business.

E. **The Court of Appeals Interpretation of "located" Is Completely Inconsistent With the Legislative History of 12 U.S.C. §94.**

The perfunctory analysis of 12 U.S.C. §94 by the Court of Appeals is further evident in the following proposition:

> "The original National Banking Act of 1863 did not make mention of suits against national banks in state courts. The provisions of the Act relating to suits in state courts were placed in the statute by later legislation. [citation omitted]. *Apparently Congress intended a different rule to apply as between suits brought in federal courts (where the bank must be established in the district) and suits brought in state courts (where the bank need only be located in the county or city of the court having similar jurisdiction in similar cases).* Otherwise, Congress would hardly have substituted 'located' for 'established' in defining venue of a suit brought in state court." App. A-3 (emphasis added).

That this conclusion is nothing more than academic speculation is demonstrated by even a casual perusal of the legislative history of 12 U.S.C. § 94. Admittedly, the original National Banking Act of 1863,[22] whether deliberately or by oversight, did not

[21] *See, e.g., National Bank of North America v. Associates of Obstetrics and Female Surgery, Inc., supra.*

[22] Act of February 25, 1863, ch. 58, 12 Stat. 665.

contain any provision permitting suits against national banks in state courts. Such suits were first authorized by Section 57 of the National Bank Act of 1864,[23] in the state, county and municipal courts where a national bank is "located". In interpreting that crucial word it should be remembered that Section 57 was not a schematically independent statute; rather it must be reconciled with the remainder of that Act. It is thus noteworthy that Section 6 of the 1864 Act required that a national bank's organization certificate designate the state, territory, or district and *the particular county* in which it operated.[24] Similarly, Section 8 of the Act additionally stipulated that a national bank's "usual business shall be transacted at an office or banking house located in *the place* specified in its organization certificate."[25]

The upshot of these sections is that at the time Section 57 of the National Bank Act of 1864 was enacted, the activities of national banking associations were restricted by Sections 6 and 8 of the Act to *one* particular location. Not until the enactment of the McFadden Act of 1927 were national banks even permitted to establish branches within their charter locations, and not until 1933 did Congress sanction national bank branches beyond the charter location.[26]

Because of the fact that in 1864 a national bank was permitted only one "location", namely the single place specified in its organization certificate, there is no statutory basis for inter-

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[23] Act of June 3, 1864, ch. 106 §30, 13 Stat. 99, 116-117, amended by Rev. Stat. §5198 (1875), as amended, 12 U.S.C. §94 (1970).

[24] 13 Stat. 101 (1864), amended by Rev. Stat. § 5134 (1875), as amended, 12 U.S.C. §22 (1970).

[25] §8, 13 Stat. 102 (1864), amended by Rev. Stat. §5190 (1875), as amended 12 U.S.C. §81 (1970) (emphasis added).

[26] *See* n. 14, *supra*.

preting the word "located" as having multi-county reference. The Court of Appeals' hypothesis that Congress deliberately chose that word to permit suits against national banks in any county in which they conducted branch banking can only be based upon the indefensible presumption that the Congress anticipated by some sixty years the advent of multi-county branch banking and formulated its statutory language accordingly.[27]

F. The Court of Appeals Decision Is Appropriate for Review.

Although the judgment of the Court of Appeals was not dispositive of the merits of this case, it is the type of ancillary decision that this Court can review on a petition for certiorari. The appellate record herein is virtually identical to that in *Mercantile National Bank v. Langdeau, supra,* where this Court noted:

> "The question of our appellate jurisdiction is quite similar to the one considered in *Construction Laborers v. Curry, ante*, p. 542, although there the jurisdiction of any and all state courts was at issue and here the inquiry is only as to which state court has proper venue to entertain an action against two national banks. *Nonetheless, a substantial*

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[27] There is no reason to suspect that Congress, between the years 1864 and the present, had any intention of repealing or limiting the coverage of 12 U.S.C. §94. *See, Mercantile National Bank v. Langdeau, supra,* 371 U.S. at 565. Indeed, there is every reason to suppose that the Congress remains completely satisfied with the original purposes and scope of 12 U.S.C. §94. As recently as 1959, Congress overhauled national bank statutes by legislation which was prefaced by the following:

> "An Act to amend the national banking laws to *clarify or eliminate ambiguities, to repeal certain laws which have become obsolete*, and for other purposes." Public Law No. 86-230, 73 Stat. 457 (1959) (emphasis added).

Since this piece of legislation did not modify the provisions of 12 U.S.C. §94 the inference can be drawn that the traditionally restrictive interpretation of 12 U.S.C. §94 remains viable.

claim, appealable under state law, is made that a federal statute, rather than a state statute, determines in which state court a national bank may be sued and, as in Curry, prohibits further proceedings against the defendants in the state court in which the suit is now pending. This is a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action. Moreover, we believe that it serves the policy underlying the requirement of finality in 28 U.S.C. § 1257 to determine now in which state court appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings." *id.*, 371 U.S. at 557-558. (Emphasis added).[28]

The jurisdictional parameters enunciated in *Langdeau* clearly encompass this particular case. The venue question herein is anterior to the merits and is unsullied by intricate factual issues. Here, as in *Langdeau*, review of the Court of Appeals decision is essential to protect C&S from the unnecessary burden and expense of defending the merits of a suit that "may all be for naught," that regardless of its outcome would abrogate C&S's important statutory rights, and that would be substantially removed from the geographical situs of all records and witnesses.

CONCLUSION

The decision of the Court of Appeals below is devoid of substantive basis in the judicial or legislative history of 12 U.S.C. § 94, and is also offensive to prior decisions of this Court. It is

[28] This same jurisdictional policy apparently underlies *National Bank of North America v. Associates of Obstetrics and Female Surgery, Inc., supra*, where the Court granted certiorari to review a judgment of the Utah Supreme Court affirming a lower court's denial of a motion to dismiss based on 12 U.S.C. §94.

revelatory of the temptation experienced by some state courts to abrogate protections that Congress has chosen to confer upon national banks. This temptation can only grow stronger, buoyed by this Court's implicit imprimatur, unless this Court reviews the issue and expressly confirms the statutory rights asserted by C&S.

Wherefore, for the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

DANIEL B. HODGSON

WILLIAM C. HUMPHREYS, JR.

PETER Q. BASSETT
ALSTON, MILLER & GAINES
1200 Citizens and Southern
National Bank Building
35 Broad Street
Atlanta, Georgia 30303

APPENDIX

OPINION

(Court of Appeals, State of Georgia Filed May 6, 1976)

51622. The Citizens and Southern National Bank v. Bougas

M-15

Marshall, Judge

This appeal arises from a suit filed by Bougas against The Citizens and Southern National Bank in the State Court of DeKalb County complaining that the C & S Bank unlawfully redeemed and converted to its own use a savings bond owned and pledged by Bougas to the bank as security for an indebtedness to the bank, allegedly the responsibility of Bougas' son claimed by the bank to be overdue. The bank answered the complaint and concurrently therewith filed a motion to dismiss the complaint on grounds of improper venue, maintaining that suit against it would lie only in Chatham County. The trial court denied the motion to dismiss but granted a certificate for immediate review. Additionally, a motion by the bank for an interlocutory appeal was granted by this court. The sole issue pending before the court in this hearing is whether venue of the pending cause of action lies in DeKalb County. *Held*:

Appellee Bougas asserts that though C & S Bank is a national bank, it is located at numerous sites in DeKalb County furnishing full service. He submits that a suit can be prosecuted in any court of competent jurisdiction in any county in which C & S is located and operating branch banks. Appellant C & S Bank rejoins that as a national bank, venue against it is governed by the provisions of Section 94 of Title 12 of the United States Code. It contends that under the provisions of that statute, C & S may be sued only in Chatham County, the county in

APPENDIX

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which its charter was issued and the location of its principal place of business.

Both parties agree that the focal point of this appeal is the correct interpretation and application of 12 USC §94. That statute, in pertinent part, provides: "Suits, actions, and proceedings against any association under this Title may be had in any district court, or territorial court of the United States held within the district in which said association may be established, or in any state, county, or municipal court in the county or city in which such association is located having jurisdiction in similar cases."

The parties are further agreed that the C & S Bank, as a national bank, is an "association" within the meaning of the federal statute. There is no dispute that the suit must be brought in a district or a county in which the bank is "established" or "located." Mercantile National Bank v. Langdeau, 371 U. S. 555 (83 SC 529, 9 LE2d 523). The point of departure occurs when a suit is brought in a state court whether venue lies in the county of "establishment" or in a county in which the bank is "located."

There are cases on each side of the question. It has been concluded that the meaning of "located," including the venue of a suit against a national bank, would be in any county of the state in which the bank has branches either on the theory that a branch bank "locates" the bank in that county or alternatively that by doing business in the county, the bank has waived its exclusive venue. See: Security Mills of Asheville, Inc. v. Wachovia Bank and Trust Co., 281 NC 525, 189 SE2d 266; Holson v. Gosnell (So. Car.), 216 SE2d 539; Frankford Supply Co. v. Matteo, 305 F.Supp., 794; Laponshon v. Lewis Charles, Inc., 212 Pa. Super 185, 240 A2d 90. See also: Stockholders Protective Committee v. First Jersey Bank, 133 NJ Super 462, 337 A. 2d 390.

In the federal courts, and in some courts considering the issue, the question over the years had been settled adversely to the contention advanced by Bougas. See: Mercantile National Bank v. Langdeau, supra; Michigan National Bank v. Robertson, 372 U. S. 591 (7 LE2d 961, 83 SC 914); Northside Iron and Metal Co., Inc. v. Dobson and Johnson, Inc., 480 F2d 798; First National Bank of Boston v. U. S. District Court of Central District of California, 468 F2d 180; Helco, Inc. v. First National City Bank, 470 F2d 883; United States National Bank v. Hill, 434 F2d 1019; Levin v. Great Western Sugar Co., 274 FSupp. 974; Odette v. Shearson, Hamil and Co., Inc., 394 FSupp. 946; Prince v. Franklin National Bank, 310 NYS2d 390; Shaefer Sons, Inc. v. Watson, 26 AD2d 659, 272 NYS 2d 790.

The original National Banking Act of 1863 did not make mention of suits against national banks in state courts. The provisions of the Act relating to suits in state courts were placed in the statute by later legislation. See: Mercantile National Bank v. Langdeau, 371 U. S. 555, supra. Apparently Congress intended a different rule to apply as between suits brought in federal courts (where the bank must be *established* in the district) and suits brought in state courts (where the bank need only be *located* in the county or city of the court having similar jurisdiction in similar cases). Otherwise, Congress hardly would have substituted "located" for "established" in defining venue of a suit brought in state court.

A close examination of the federal cases dealing with the dichotomy of "established" and "located" discloses that in each of those cases the federal court was dealing with its own venue, i.e., was the bank established (under its charter) within the federal court's district. E.g., Helco, Inc. v. First National City Bank, 470 F2d 883, supra. None of the cases were dealing with the venue of a suit brought in a state court in a county in which the bank was operating a branch facility but in which

it was not "established." In order to accept venue, the federal courts were required, under the express language of § 94, to conclude that a bank must be "established" in its district, and of course, it would be "located" there also. We find these cases to be inapposite to the problem presented by this case, because in a state court the bank need not be both "established" *and* "located" in the county.

As to whether a national bank is "located" in a county simply by setting up a branch to conduct general bank business, therein, it seems clear that it has manifested an intent to be found in that jurisdiction for purposes of suits arising out of any business conducted there. Lapinsohn v. Lewis Charles, Inc., supra.

"We conclude that when a national bank, 'established' in this state, operates and maintains in counties other than the county of its principal office, branches at which it conducts its general banking business, the corporation is present at all times each such branch and is 'located' therein within the meaning of this Act of Congress. Thus, it is subject to suit in a state court in such county, otherwise having jurisdiction, just as it is in the county wherein its principal office is located." *Security Mills v. Asheville v. Wachovia B & T Co., supra,* at page 271.

Such an interpretation is in harmony with the laws of venue of this state which provide that a corporation may be sued on contract in any county in which the contract was made or was to be performed; and as to torts, it may be sued in the county where the cause of action originated. See: Ga. L. 1968, pp. 565, 584; 1975, pp. 583, 857 (Code Ann. § 22-404 (c) and (d)). Insofar as the footnote found in *Carswell v. Cannon,* 110 Ga. App. 315 (138 SE2d 468), at page 317, may imply a contrary result, we find the language therein to be obiter dicta, not persuasive and decline to follow its lead.

Judgment affirmed. Pannell, P. J., and McMurray, J., concur.

(Order, filed August 22, 1975)

In the State Court of DeKalb County
State of Georgia

Nick Bougas

vs.

The Citizens and Southern National Bank

Civil Action
File No. C77256

ORDER

Defendant's motion to dismiss, having been filed in the above-style case and having come on for hearing before this Court, after hearing argument of counsel and considering the papers on file in the case it is hereby ordered:

That the defendant's motion to dismiss filed in the above-style case be denied.

This the 22 day of August, 1975.

s/ J. O. MITCHELL
Judge, DeKalb State Court

(Judgment, filed May 6, 1976)

Court of Appeals of the
State of Georgia

Atlanta, May 6, 1976

The Honorable Court of Appeals met pursuant to adjournment. The following judgment was rendered:

51622. The Citizens and Southern National Bank v. Nick Bougas

This case came before this court on appeal from the State Court of DeKalb County: and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. Pannell, P. J., Marshall and McMurray, JJ., concur.

Bill of costs $30.00.

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta

Sep. 20, 1976

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia, and that ..... paid the above bill of costs.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

MORGAN THOMAS
Clerk

(Order, filed May 21, 1976)

Court of Appeals of the
State of Georgia

Atlanta, May 21, 1976

The Honorable Court of Appeals met pursuant to adjournment. The following order was passed:

51622. The Citizens and Southern National Bank v. Bougas.

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta

May 21, 1976

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

MORGAN THOMAS
Clerk

(Order, filed June 30, 1976)

Supreme Court of Georgia

Atlanta, June 30, 1976

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

31402. Citizens and Southern Bank v. Nick Bougas.

Upon consideration of the application for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby denied. All the Justices concur except Hill, J., dissents and Nichols, C. J., disqualified.

Supreme Court of the State of Georgia
Clerk's Office, Atlanta

July 29, 1976

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

JOLINE B. WILLIAMS
Clerk

Case No. 51622
Court of Appeals of Georgia

Remittitur from Supreme Court

Filed in office

Clerk, Court of Appeals of Georgia

(Order, filed July 15, 1976)

Supreme Court of Georgia

Atlanta, July 15, 1976

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

31402. Citizens and Southern National Bank v. Nick Bougas.

Upon consideration of the motion for a reconsideration filed in this case, it is ordered that it be hereby denied. All the Justices concur, except Ingram and Hill, JJ., dissent and Nichols, C. J., disqualified.

Supreme Court of the State of Georgia
Clerk's Office, Atlanta

September 17, 1976

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

HAZEL E. HALLFORD
Deputy Clerk

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-398

THE CITIZENS AND SOUTHERN NATIONAL BANK,
Petitioner,

vs.

NICK BOUGAS,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF GEORGIA

PETITION FOR CERTIORARI FILED SEPTEMBER 15, 1976
CERTIORARI GRANTED JANUARY 25, 1977

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-398

THE CITIZENS AND SOUTHERN NATIONAL BANK,
Petitioner,

vs.

NICK BOUGAS,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF GEORGIA

APPENDIX

TABLE OF CONTENTS

DOCKET ENTRIES

State Court of Dekalb County
State of Georgia

Nick Bougas
vs.
Citizens and Southern National Bank

Civil Action
File No. C-77256

Date	Filings—Proceedings
1975	
June 30	Complaint of Plaintiff Nick Bougas (hereinafter "Bougas") against Defendant Citizens and Southern National Bank (hereinafter "C&S") filed.
July 29	C&S Answer filed.
July 29	C&S Motion to Dismiss, Brief, Affidavit of William C. Humphreys, Jr. in Support of Motion, and Notice of Motion filed.
Aug. 22	C&S Motion to Dismiss Argued.
Aug. 22	Order entered Denying C&S Motion to Dismiss.
Sept. 2	C&S Certificate for Immediate Review filed.
Sept. 25	Notation of Georgia Court of Appeals Order Granting C&S Application for Interlocutory Appeal.
Oct. 1	C&S Notice of Appeal filed.

DOCKET ENTRIES

Court of Appeals of the
State of Georgia

The Citizens and Southern National Bank vs. Nick Bougas	51622

Date	Filings—Proceedings
1975	
Sept. 11	C&S Petition for Immediate Review filed.[1]
Sept. 24	Order entered granting C&S Application for Interlocutory Appeal.[2]
Oct. 17	Record of the State Court of DeKalb County filed.
Nov. 5	C&S Enumeration of Errors filed.
Nov. 5	C&S Brief of Appellant filed.
Nov. 10	C&S Appeal calendared for oral argument on January 6, 1976.
Nov. 25	Bougas Brief of Appellee filed.
Dec. 3	C&S Brief of Appellant in Reply to Brief of Appellee filed.

[1] The C&S Petition for Immediate Review, a procedural prerequisite to interlocutory appeal, and all Orders dispositive thereof, being anterior to actual appeal, are docketed in a separate index which does not comprise the Court of Appeals General Docket entries in Case No. 51622.

[2] *See* n.1, *supra*.

Date	Filings—Proceedings
1976	
Jan. 6	Oral Argument on appeal.
Jan. 12	Bougas Supplemental Brief of Appellee filed.
May 6	Judgment and Opinion entered affirming Order of the State Court of DeKalb County.
May 14	C&S Motion for Rehearing and Brief in Support of Motion filed.
May 21	Order entered denying C&S Motion for Rehearing.
May 27	C&S Notice of Intention to Apply to the Georgia Supreme Court for a Writ of Certiorari filed.

DOCKET ENTRIES

Supreme Court of the
State of Georgia

Citizens and Southern National Bank vs. Nick Bougas	31402

Date	Filings—Proceedings
1976	
June 18	C&S Petition for Certiorari filed.
June 30	Order entered denying Writ of Certiorari.
July 9	C&S Motion for Reconsideration and Brief in Support of Motion filed.
July 15	Order entered denying C&S Motion for Reconsideration.

IN THE STATE COURT OF DEKALB COUNTY
STATE OF GEORGIA

(Title Omitted in Printing)

COMPLAINT

(Filed June 30, 1975)

Nick Bougas, plaintiff, states his complaint, as follows:

1

The defendant Citizens and Southern National Bank is a corporation doing business at I West Court Square, Decatur, DeKalb County, Georgia, and is subject to the jurisdiction of this Court.

2

Defendant is indebted to the plaintiff in the sum of $26,-040.00 plus interest from the date of conversion, February 25, 1975, actual damages and $100,000.00 punitive damages as shall hereinafter be shown.

3

Plaintiff is the owner of one Bond No. V1208607, which he entrusted to the defendant in November, 1972, at which time he assigned said savings certificate as collateral on a note signed by his son, Arthur Nick Bougas, and on which he, your plaintiff, signed as a surety.

4

On or about February 25, 1975, defendant unlawfully redeemed and converted to its own use the following described

personal property of the plaintiff: A Citizens and Southern Savings Certificate No. V-1208607 in the name of Mr. Nick Bougas with a fact value of $25,000.00 and a value on February 25, 1975, of $26,040.00.

5

That defendant did redeem plaintiff's bond on the basis of an alleged default of plaintiff's son, Arthur Nick Bougas, on a note in which said Arthur Nick Bogus had signed as surety for one Marvin Welsh. Plaintiff's son was not in default on said note signed by Marvin Welsh or the note signed by the son himself for which your plaintiff had signed as a surety.

6

Plaintiff's son, Arthur Nick Bougas, had been discharged as a surety on the note signed by Marvin Welsh by the defendant's varying the terms of the contract with the said Marvin Welsh without said Arthur Nick Bougas' consent by the defendant's altering the payment schedule and rate of interest.

7

The note signed by Arthur Nick Bougas on which your plaintiff signed as surety was not in arrears.

8

When the defendant wrongfully redeemed the bond of your plaintiff, he deducted from the proceeds the amount outstanding on the loan signed by Arthur Nick Bogus as principal, the balance of the loan signed by Arthur Nick Bougas as surety, and attorney's fees.

9

Plaintiff has been without the use of the funds evidenced by the bond since February, 1975, and has been denied interest on said funds.

10

The actions of the said defendant were deliberate and wilful, and done to defraud plaintiff of his bond and the use thereof; and the plaintiff asks the Court to award him punitive damages in the amount of $100,000.00.

Wherefore, plaintiff prays:

(a) That process issue;

(b) That the plaintiff be awarded actual damages in the amount of $26,040.00 plus interest from February 25, 1975, and punitive damages in the amount of $100,000.00.

(c) That he be awarded any other relief that the Court deems fit and proper under the circumstances;

(d) That he be awarded attorney's fees in the amount of $10,000.00 for having to bring this suit against the defendant.

HENDON, EGERTON, HARRISON,
GLEAN & KOVACICH
/s/ E. T. HENDON, JR.
/s/ MICHAEL J. KOVACICH
Attorneys for Plaintiff

101 Trust Building
Decatur, Georgia 30030
378-3627

(Complaint Backing Summons and Return of Service
Omitted in Printing)

IN THE STATE COURT OF DeKALB COUNTY
STATE OF GEORGIA

(Title Omitted in Printing)

ANSWER

(Filed July 29, 1945)

Now Comes the Defendant, the Citizens and Southern National Bank and answers the Complaint as follows:

First Defense

The Complaint fails to state a claim upon which relief can be granted.

Second Defense

1. Defendant admits that it is a corporation and conducts business at 1 West Court Square, Decatur, DeKalb County, Georgia among other places, but denies that it is located there and denies that it is subject to the jurisdiction of this Court.

2. Defendant denies the allegations of paragraph 2 of the Complaint.

3. Answering paragraph 3 of the Complaint the Defendant admits that the Plaintiff granted a security interest in and assigned The Citizens and Southern Savings Bond No. V1208607 to The Citizens and Southern National Bank November 28, 1972 to secure the payments of all obligations of Arthur Nick Bougas, his son, to The Citizens and Southern National Bank, however incurred or evidenced, whether direct or indirect, absolute or contingent, now or hereafter existing, or due or to become due. Defendant is without knowledge or information

sufficient to form a belief as to the truth of any other allegations of paragraph 3 of the Complaint.

4. Defendant denies the allegations of paragraph 4 of the Complaint.

5. Answering paragraph 5 of the Complaint the Defendant admits that it did redeem Plaintiff's bond to satisfy the guaranty indebtedness of the Plaintiff, which indebtedness had matured upon the debt of Arthur Nick Bougas having been declared in default. The indebtedness of Arthur Nick Bougas to The Citizens and Southern National Bank was declared in default February 5, 1975 if not actually done sooner. The remaining allegations of paragraph 5 of the Complaint are denied.

6. Defendant denies the allegations of paragraphs 6, 7, 8, 9, and 10 of the Complaint.

Wherefore, having fully answered the Defendant, The Citizens and Southern National Bank prays that it be discharged without costs.

/s/ WILLIAM HUMPHREYS

ALSTON, MILLER & GAINES
Twelth Floor, Citizens & Southern
National Bank Building
Atlanta, Georgia 30303

/s/ RICHARD A. ROMINGER

ADAMS, ADAMS, BRENNAN & GARDNER
Post Office Box 1208
Savannah, Georgia 31402

Attorneys for Defendant, The Citizens
and Southern National Bank

(Certificate of Service Omitted in Printing)

IN THE STATE COURT OF DeKALB COUNTY
STATE OF GEORGIA

(Title Omitted in Printing)

MOTION TO DISMISS AND BRIEF IN SUPPORT OF MOTION

(Filed July 29, 1975)

Defendant, The Citizens and Southern National Bank, pursuant to the provisions of Georgia Code Ann. § 81A-112(b) moves the Court for an Order dismissing the Complaint against it on the grounds of improper venue and lack of jurisdiction over Defendant.

Defendant is a national banking association chartered in Savannah, Chatham County, Georgia, as shown by the Affidavit and exhibit attached hereto and incorporated by reference herein.

Under the provisions of 12 U.S.C.A. § 94 as applied by the Georgia Court of Appeals in **Carswell v. Cannon,** 110 Ga. App. 315 (1964), a national bank can only be sued in the county in which its charter was issued.

Since Defendant The Citizens and Southern National Bank was chartered in Savannah, Chatham County, Georgia, suit can be maintained against it only in Chatham County, Georgia.

For the foregoing reasons, Defendant prays that this Court issue an Order dismissing the Complaint against it.

This 28 day of July, 1975.

/s/ WILLIAM C. HUMPHREYS, JR.
/s/ RICHARD A. ROMINGER
Counsel for Defendant The Citizens
and Southern National Bank

Of Counsel:

ALSTON, MILLER & GAINES
1200 Citizens and Southern
National Bank Building
Atlanta, Georgia 30303
(404) 588-0300

ADAMS, ADAMS, BRENNAN & GARDNER
15 Drayton Street
Savannah, Georgia 31402

(Certificate of Service Omitted in Printing)

IN THE STATE COURT OF DeKALB COUNTY
STATE OF GEORGIA

(Title Omitted in Printing)

Affidavit of William C. Humphreys, Jr.

(Filed July 29, 1975)

State of Georgia
County of Fulton

I, William C. Humphreys, Jr., on oath depose and say the following:

1

I am an attorney with the law firm of Alston, Miller & Gaines and the law firm is general counsel to The Citizens and Southern National Bank.

2

Attached hereto as Exhibit A is a true and correct copy of the Certificate of the Deputy Comptroller of the Currency showing

the Charter of The Citizens and Southern National Bank to have been issued in Savannah, Chatham County, Georgia.

This 25 day of July, 1975.

/s/ WILLIAM C. HUMPHREYS, JR.

Sworn to and subscribed before me this 25th day of July, 1975.

Linda Cowan
Notary Public

Exhibit A—Page 1

Certificate

Treasury Department
Office of
Comptroller of the Currency } ss

I, Thomas G. DeShazo, Deputy Comptroller of the Currency, do hereby certify that:

1. Pursuant to Revised Statutes 324, et seq., as amended, 12 U.S.C. 1, et seq., the Comptroller of the Currency charters and exercises regulatory and supervisory authority over all national banking associations;

2. On May 2, 1927, The Citizens and Southern Bank of Savannah, Savannah, Georgia, was chartered as a National Banking Association under the laws of the United States and under the title of "The Citizens and Southern National Bank";

3. The document hereto attached is a true and complete copy of the Charter Certificate issued to The Citizens and

Southern National Bank, Savannah, Georgia, the original of which certificate was issued by this Office on May 2, 1927;

4. Effective January 29, 1968, the title of the subject bank was changed to "The Citizens and Southern National Bank of Georgia", and effective January 31, 1969, the title was again changed to "The Citizens and Southern National Bank"; and

The Citizens and Southern National Bank, Savannah, Georgia, continues to hold a valid certificate to do business as a National Banking Association.

In Testimony Whereof, I have hereunto subscribed my name and caused the seal of Office of the Comptroller of the Currency to be affixed to these presents at the Treasury Department, in the City of Washington and District of Columbia, this 7th day of May, A. D. 1970.

/s/ Thomas G. DeShazo
Deputy Comptroller of the Currency

(Seal)

Exhibit A—Page 2

No. 13068

TREASURY DEPARTMENT

Office of Comptroller of the Currency

Washington, D.C., May 2, 1927

Whereas, by satisfactory evidence presented to the undersigned, it has been made to appear that The Citizens and

Southern National Bank in the City of Savannah in the County of Chatham and State of Georgia has complied with all the provisions of the Statutes of the United States, required to be complied with before an association shall be authorized to commence the business of Banking;

Now, therefore, I, J. W. McIntosh, Comptroller of the Currency, do hereby certify that "The Citizens and Southern National Bank", in the City of Savannah, in the County of Chatham and State of Georgia is authorized to commence the business of Banking as provided in Section Fifty-one hundred and sixty-nine of the Revised Statutes of the United States. Conversion of the Citizens and Southern Bank of Savannah with a main office in Savannah, one branch in Savannah and 8 branches outside Savannah within the limits of the state of Georgia.

In testimony whereof, witness my hand and seal of office this Second day of May, 1927.

J. W. McINTOSH
Comptroller of the Currency

(Certificate of Service Omitted in Printing)

IN THE STATE COURT OF DEKALB COUNTY
STATE OF GEORGIA

(Title Omitted in Printing)

NOTICE OF MOTION

(Filed July 29, 1975)

To: Nick Bougas
E. T. Hendon, Jr., Counsel for Plaintiff
Hendon, Egerton, Harrison, Glean & Kovacich
101 Trust Building
Decatur, Georgia 30030

Please take notice that Defendant will bring the within and foregoing Motion to Dismiss on for hearing before the Presiding Judge, State Court of DeKalb County, on the 22 day of August, 1975, at 9:30 o'clock A.M., then and there to be heard.

/s/ WILLIAM C. HUMPHREYS, JR.

Of Counsel
ALSTON, MILLER & GAINES
1200 Citizens and Southern
National Bank Building
Atlanta, Georgia 30303
(404) 588-0300

/s/ RICHARD A. ROMINGER

ADAMS, ADAMS, BRENNAN & GARDNER
15 Drayton Street
Savannah, Georgia 31402
(912) 233-8081

Counsel for Defendant The Citizens and Southern National Bank

(Certificate of Service Omitted in Printing)

IN THE STATE COURT OF DEKALB COUNTY
STATE OF GEORGIA

(Title Omitted in Printing)

ORDER (Entered August 22, 1975)[3]

[Printed in its entirety on page A-5 of the Petition for Writ of Certiorari]

COURT OF APPEALS OF THE
STATE OF GEORGIA

(Title Omitted in Printing)

OPINION (Entered May 6, 1976)

[Printed in its entirety on pages A-1 through A-4 of the Petition for Writ of Certiorari]

COURT OF APPEALS OF THE
STATE OF GEORGIA

(Title Omitted in Printing)

JUDGMENT (Entered May 6, 1976)

[Printed in its entirety on page A-6 of the Petition for Writ of Certiorari]

---

[3] Denying Motion to Dismiss.

COURT OF APPEALS OF THE
STATE OF GEORGIA

(Title Omitted in Printing)

ORDER (Entered May 21, 1976)[4]

[Printed in its entirety on page A-7 of the
Petition for Writ of Certiorari]

SUPREME COURT OF THE
STATE OF GEORGIA

(Title Omitted in Printing)

ORDER (Entered June 30, 1976)[5]

[Printed in its entirety on page A-8 of the
Petition for Writ of Certiorari]

SUPREME COURT OF THE
STATE OF GEORGIA

(Title Omitted in Printing)

ORDER (Entered July 15, 1976)[6]

[Printed in its entirety on page A-9 of the
Petition for Writ of Certiorari]

---

[4] Denying Motion for Rehearing.

[5] Denying Writ of Certiorari.

[6] Denying Motion for Reconsideration.

IN THE
SUPREME COURT OF THE UNITED STATES

NO. 76-398

THE CITIZENS AND SOUTHERN NATIONAL BANK,
Petitioner,

vs.

NICK BOUGAS,
Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI To the Court of Appeals of the State of Georgia

E. T. HENDON
MICHAEL J. KOVACICH
HENDON, EGERTON, HARRISON, GLEAN
& KOVACICH
101 Trust Building
103 Sycamore Street
Decatur, Georgia 30030
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COUNSEL FOR RESPONDENT.

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 76-398

THE CITIZENS AND SOUTHERN NATIONAL BANK,
Petitioner,

vs.

NICK BOUGAS,
Respondent.

RESPONSE IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
To the Court of Appeals of the
State of Georgia

The writ of certiorari should be denied because the Court of Appeals has correctly determined the issue. It should be pointed out that this Honorable Court denied certiorari in a case involving exactly the same issue earlier this year. Holson v. Gosnell, 264 S.C. 619, 216 S.E.2d 539 (1975) cert. denied, 423 U.S. 1048 (1976).

The two most significant bases on which the issue could be decided and supporting authority is set forth below.

(1) That by the establishment of a branch bank in a county, a national bank presumably waives any questions of venue raised by 12 U.S.C. § 94. This aspect was broached by the Court of Appeals in its decision and has been the basis of deciding this issue in other jurisdictions. Lapinsohn v. Lewis Charles, Inc., 212 Pa. Super. 185, 240 A.2d 90, cert. denied 393 U.S. 952 (1968); Security Mills of Asheville, Inc. v. Wachovia Bank & Trust Co., 281 N.C. 525, 189 S.E.2d 266 (1972) (alternative holding.); Reeves v. Bank of America, 352 Fed. Supp. 745, (1973 D.C. Cal.); Frankfurt Supply Co. v. Mateau, 320 Fed. Supp. 794.

(2) The other basis on which the decision is appropriate is that a national bank is "located" in

any county in which it operates and maintains branches within the provisions of the statute. Security Mills of Asheville, Inc. v. Wachovia Bank and Trust Co., supra; Holson v. Gosnell, supra; Central Bank v. Superior Court, 30 Cal. App. 3d 962, 106 Cal. Rptr. 912 (1973).

In conclusion, there is reasonable basis for the decision of the Court of Appeals and authority from other jurisdictions arriving at the same conclusion; and the issue is the same one as before this Court less than a year ago in the Holson case, at which time this Court deemed it appropriate to deny the writ, and respondent would contend that the situation has not changed since the Court denied the petition for certiorari in the Holson case.

WHEREFORE, for the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

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Petitioner,

v.

NICK BOUGAS,
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On Writ of Certiorari to the Court of Appeals of the State of Georgia

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Georgia Court of Appeals (App. A-1—A-4)* is reported in 138 Ga. App. 706, 227 S.E.2d 434 (1976). The order of the State Court of DeKalb County (App. A-5), the judgment of the Court of Appeals (App. A-6) and the orders denying rehearing, petition for certiorari and reconsideration (App. A-7—A-9) are unreported.

* Citations to the Petition Appendix and to the Single Appendix are denoted as "App. . . ." and "A. . . .", respectively.

JURISDICTION

The judgment of the Georgia Court of Appeals was entered on May 6, 1976 (App. A-6), affirming the order of the State Court of DeKalb County dated August 22, 1975. App. A-5. The Court of Appeals denied a timely motion for rehearing on May 21, 1976. App. A-7. Thereafter, on June 30, 1976, the Georgia Supreme Court denied a duly filed petition for certiorari, one Justice dissenting (App. A-8); a motion for reconsideration was finally denied by the Supreme Court on July 15, 1975, two Justices dissenting. App. A-9. The Petition for Writ of Certiorari was filed on September 15, 1976, and was granted on January 25, 1977. — U.S. —, 45 U.S.L.W. 3508. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) (1970).

QUESTION PRESENTED

Whether 12 U.S.C. § 94 requires that transitory[1] actions in state courts against national banking associations conducting business in more than one county must be maintained, for venue purposes, only in the association's home county designated in its federal charter certificate?[2]

STATUTE INVOLVED

Rev. Stat. § 5198 (1878), 12 U.S.C. § 94 (1970) provides:

> "Actions and proceedings against any association under this chapter may be had in any district or Territorial court

[1] The "local action" exception to 12 U.S.C. §94 is discussed n. 33, *infra*.

[2] The record herein comprises, *inter alia*, a true copy of Petitioner's charter certificate (A. 12-13) duly issued under seal of the Comptroller of the Currency. *See* 12 U.S.C. §27 (1970).

> of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

STATEMENT OF THE CASE

This case, involving a suit for alleged unlawful redemption and conversion of a particular savings bond (A. 4-6), was filed in the State Court of DeKalb County, Georgia, on June 30, 1975, by Nick Bougas (hereinafter "Bougas") against The Citizens and Southern National Bank (hereinafter "C&S"), a national banking association chartered in Chatham County, Georgia, under the laws of the United States. On July 29, 1975, C&S duly answered (A. 7-8) and concurrently filed a motion to dismiss the complaint, with supporting documentation, showing as grounds therefor that 12 U.S.C. § 94 lays exclusive venue, in transitory actions against a national banking association, in its home county which, for C&S, is Chatham County, Georgia. A. 9-13. On August 22, 1975, the C&S motion to dismiss was denied without discussion of the 12 U.S.C. § 94 privilege. App. A-5.

On appeal to the Georgia Court of Appeals[3] C&S reiterated the 12 U.S.C. § 94 mandate restricting venue, in transitory suits against a national bank, to the bank's home county as specified in its charter certificate.[4] In its decision of May 6, 1976, the

[3] C&S perfected its interlocutory appeal under Ga. Code Ann. §6-701(a)2(A) by duly obtaining a certificate for immediate review from the trial court (R. 18) and an order from the Court of Appeals granting interlocutory appeal (R. 19); the requisite notice of appeal was timely filed in the State Court of DeKalb County on October 1, 1975. R. 1-2.

[4] The C&S arguments are set forth in the "Brief of Appellant," which is included in the certified record herein but is not separately paginated as part of the record.

Court of Appeals recognized both the applicability of 12 U.S.C. § 94 to C&S as an "association under this chapter" (App. A-2) and that 12 U.S.C. § 94 posits mandatory venue in suits against national banking associations. App. A-2. Furthermore, the Court of Appeals implicitly acknowledged that C&S is "established," within the meaning of 12 U.S.C. § 94, only in that federal district encompassing Chatham County, the home county and principal place of business specified in its charter certificate, and *not* in whatever district it may conduct business. App. A-1, 2, 3, 4; *see* A. 11-13.

However, although cognizant of the significant federal and state authority postulating that "established" and "located" in 12 U.S.C. § 94 are functionally synonymous words designating a single federal district and state county, respectively, in which transitory actions against national banks can be prosecuted (*see* App. A-3), the Court of Appeals perceived a semantical distinction between these two words:

> "Apparently Congress intended a different rule to apply as between suits brought in federal courts (where the banks must be *established* in the district) and suits brought in state courts (where the bank need only be *located* in the county or city of the court having similar jurisdiction in similar cases). Otherwise, Congress hardly would have substituted 'located' for 'established' in defining venue of a suit brought in state court." (App. A-3).

On the basis of this dichotomy, the Court of Appeals held:

> "We conclude that when a national bank, 'established' in this state, operates and maintains in counties other than the county of its principal office, branches at which it conducts its general banking business, the corporation is present at all times [in] each such branch and is 'located' therein within the meaning of this Act of Congress. Thus, it is subject to suit in a state court in such county, otherwise having jurisdiction, just as it is in the county wherein its principal office is located." App. A-4.

The C&S motion for rehearing in the Court of Appeals,[5] and the petition for certiorari and motion for reconsideration in the Georgia Supreme Court, were substantially based upon the erroneous interpretation of 12 U.S.C. § 94 by the Court of Appeals and were denied without opinion. App. A-7—A-9.

SUMMARY OF ARGUMENT

Although all lower federal courts and certain state courts are in accord that a national bank is "established" and "located" under 12 U.S.C. § 94 only in that federal district and state county, respectively, in which its charter was issued, other state courts have sanctioned venue in suits against a national bank in any county wherein it maintains branch banks as well as in the charter county, either on the theory that the erection of a branch bank "locates" a national bank in that county, or that the establishment of the branch bank constitutes a presumptive pre-litigation waiver of the 12 U.S.C. § 94 venue privilege.

An analysis of the statutory language, congressional purpose and legislative history of 12 U.S.C. § 94 and similar statutes indicates that the words "established" and "located" were used interchangeably in 12 U.S.C. § 94 to designate an exclusive federal district and state county in which transitory actions against a national bank could be prosecuted. Excepting local actions and waiver of the 12 U.S.C. § 94 venue privilege by belated interposition of the defense, this Court has consistently confirmed that 12 U.S.C. § 94 was intended to "locate" a national bank only in its home (charter) county, notwithstanding

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[5] The filing of a motion for rehearing is a statutory prerequisite to petitioning for certiorari in the Georgia Supreme Court. Ga. Code Ann. §24-4536(h).

the antiquity of the national bank venue statute and ever-evolving policy considerations.

Having concluded that a national bank is only "located" and subject to suit in its home county, the statutory intent of 12 U.S.C. § 94 cannot be vitiated by finding a presumptive prelitigation waiver of venue attributable to the erection of branch banks in other counties.

ARGUMENT

Introduction

This case presents the primary question of where a national bank is "located" within the meaning of 12 U.S.C. § 94[6] for purposes of defending transitory suits in state courts.[7] Secondary, but necessarily concomitant to this question, is the correlative issue of whether the venue provisions of 12 U.S.C. § 94 can be presumptively waived prior to litigation by the conduct

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[6] "located" is also employed in at least two other statutes dealing with national banks. A proviso was added in 1864 to the predecessor of 12 U.S.C. §94 (13 Stat. 99, 116, as amended, 28 U.S.C. §1394) stipulating that suits against the Comptroller of the Currency "shall be had . . . in the district in which the association is located." *See First National Bank v. Williams*, 252 U.S. 504 (1920) for a history of this particular provision.

The citizenship of a national bank is governed by 28 U.S.C. §1348 (originally enacted in 1882 as 22 Stat. 162, 163) which provides that banks shall be citizens "of the States in which they are respectively located." *See Herrmann v. Edwards*, 238 U.S. 107, 111 (1915) for a history of this provision and *American Surety Co. v. Bank of California*, 133 F.2d 160 (9th Cir. 1943) for a judicial interpretation of "located" in this context.

[7] 12 U.S.C. §94 independently regulates venue in the federal courts, providing that suits against national banking associations "may be had in any district or Territorial court of the United States held within the district in which such association may be established . . ." Although several federal courts consider the words "established" and "located" to be functionally interchangeable, the interpretative holdings of such courts, as federal courts, must be restricted to the meaning of the word "established" in 12 U.S.C. §94. *See, e.g., United States National Bank v. Hill*, 434 F.2d 1019 (9th Cir. 1970); *Northside Iron & Metal Co. v. Dobson and Johnson, Inc.*, 480 F.2d 798 (5th Cir. 1973); *Fisher v. First National Bank*, 538 F.2d 1284 (7th Cir. 1976); *McClung v. LaSalle National Bank*, 387 F. Supp. 977 (S.D. Iowa 1975). In recognition of this fact, the Court of Appeals noted:

> "A close examination of the federal cases dealing with the dichotomy of 'established' and 'located' discloses that in each of those cases the federal court was dealing with its own venue, i.e., was the bank established (under its charter) within the

of business or the maintenance of branch banks in several counties.[8]

In terms of legal methodology, the resolution of these questions must be grounded in principles of statutory interpretation. Unfortunately, within recent years, such principles have frequently been subsumed in penumbral policy considerations and artful rhetoric which have become the prevalent modes of circumventing the applicability of 12 U.S.C. § 94. As a result, three diverse interpretative theories predominate in the state courts:

1. Certain courts have held that the words "established" and "located" are functionally synonymous and, following the federal interpretation of "established"[9] have concluded that, absent intentional waiver, transitory suits in state courts can only be brought in the national bank's home county specified in its charter certificate. *Gregor J. Schaefer Sons, Inc. v. Watson*, 26

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federal court's district. [citation omitted]. None of the cases were dealing with the venue of a suit brought in a state court in a county in which the bank was operating a branch facility but in which it was not 'established.'" App. A-3—A-4.

This truistic analysis is faultless: the lower federal courts and all state courts are inherently precluded from adjudicating venue questions in courts of disparate jurisdictional bases.

[8] The Court of Appeals commented:

"As to whether a national bank is 'located' in a county simply by setting up a branch to conduct general bank business, therein, it seems clear that it has manifested an intent to be found in that jurisdiction for purposes of suits arising out of any business conducted there." App. A-4.

Although this observation broaches the issue of waiver, it may erroneously suggest that *this suit* arose out of a C&S branch in DeKalb County, whereas the record shows only that C&S conducts business at a designated place in DeKalb County. A. 7.

[9] The lower federal courts are in unanimous accord that a national bank is "established" only in that federal district encompassing the national bank's home county. *E.g., Leonardi v. Chase National Bank*, 81 F.2d 19 (2d Cir.), *cert. denied*, 298 U.S. 677 (1936); *Northside Iron & Metal Co. v. Dobson and Johnson, Inc.*, 480 F.2d 798 (5th Cir. 1973).

A.D.2d 659, 272 N.Y. Supp. 2d 790 (1966); *Prince v. Franklin National Bank*, 62 Misc. 2d 855, 310 N.Y. Supp. 2d 390 (1970); *Ebeling v. Continental Illinois National Bank & Trust Co.*, 272 Cal. App. 2d 724, 77 Cal. Rptr. 612 (1969).

2. The diametrically opposed position espoused by some courts rejects the synonymity of "established" and "located", and concludes that a national bank is "located" in any county in which it operates and maintains branches conducting general banking business, notwithstanding that it may be "established" only in the home county specified in its charter certificate. *Security Mills of Asheville, Inc. v. Wachovia Bank & Trust Co.*, 281 N.C. 525, 189 S.E.2d 266 (1972); *Holson v. Gosnell*, 264 S.C. 619, 216 S.E.2d 539 (1975), *cert. denied*, 423 U.S. 1048 (1976); *Central Bank v. Superior Court*, 30 Cal. App. 3d 962, 106 Cal. Rptr. 912 (1973).

3. A third theory has emerged which is premised not upon pure analysis of the word "located," but rather upon a notion of "presumptive"[10] waiver. The judicial adherents to this theory, while paying superficial homage to the general principle that a national bank is "located" only in its home county, hypostasize a waiver of 12 U.S.C. § 94 by the creation of a branch bank, concluding therefrom that a national bank can be sued in any county in which it operates a branch bank, at least as to actions arising out of its banking activity at such branch. *Lapinsohn v. Lewis Charles, Inc.*, 212 Pa. Super. 185, 240 A.2d 90, *cert.*

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[10] The waiver is "presumptive" because it automatically ensues from the creation of a branch bank without regard to the voluntary intention of the national bank. Thus alienated from the facts of each particular case, the theoretical legitimacy of this type of waiver is actually a question of law subject to review as such on appeal. *See* §D, *infra*.

A variation of this theory postulates a "waiver" of the 12 U.S.C. §94 venue privilege as to actions arising out of any business conducted in the county in which suit is brought, whether or not branch banking is conducted in that county. *E.g., Vann v. First National Bank*, 324 So.2d 94 (Fla. App. 1976).

denied, 393 U.S. 952 (1968); *Security Mills of Asheville, Inc. v. Wachovia Bank & Trust Co., supra* (alternative holding).[11]

The Court of Appeals' decision falls within the purview of the second theory[12] and is fatally flawed in its analytical base which comprises little more than gossamer speculation in disregard of a cardinal precept of statutory construction:

> "Words generally have different shades of meaning, and are to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning in particular instances is to be arrived at not only by consideration of the words themselves, but by considering, as well, the context, the purposes of law, and the circumstances under which the words were employed." *Puerto Rico v. Shell Co. (P.R.), Ltd.*, 302 U.S. 253, 258 (1937).

Conspicuously absent in the Court of Appeals' decision is not only a fully explicated semantical analysis of the stautory language, but also any apparent concern with the legislative history, context, or congressional purpose of 12 U.S.C. § 94. A proper analysis of these factors compels a finding that C&S is "located" only in Chatham County, Georgia, the home county and principal place of business specified in its charter certificate, and that venue herein does not lie in DeKalb County, Georgia.

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[11] In the calendar year 1976 alone, several representative samples and permutations of the three theories, emanating from both the federal and state courts, were before this Court for consideration. *Holson v. Gosnell, supra* (interpretation of "located"); *National Bank of North America v. Associates of Obstetrics and Female Surgery, Inc.*, 425 U.S. 460 (1976) ("permissiveness"); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976) ("implied repealer"); *Chase Manhattan Bank v. Sailboat Apartment Corp.*, 318 So.2d 575 (Fla. App. 1975), *vacated*, 45 U.S.L.W. 3322 (U.S. Nov. 1, 1976) (76-126) ("waiver"); *Cogdell v. Fort Worth National Bank*, 536 S.W.2d 257 (Tex. Civ. App. 1976), *cert. docketed*, 45 U.S.L.W. 3451 (U.S. Dec. 27, 1976) (No. 76-882) ("waiver").

[12] The actual ruling of the Court of Appeals was drawn verbatim from *Security Mills of Asheville, Inc. v. Wachovia Bank & Trust Co., supra*, 281 N.C. at 532, 189 S.E.2d at 271. *See* App. A-4.

A. The Statutory Language of 12 U.S.C. § 94 Affirms That a National Bank Is "located" and "established" in Only One Situs.

"The starting point is every case involving construction of a statute is the language itself,"[13] which is the most persuasive evidence of congressional intent. *See Perry v. Commerce Loan Co.*, 383 U.S. 392, 400 (1966). However, this principle does not sanction the severance of particular words from the remaining language of a statute for the type of isolated analysis undertaken by the Court of Appeals:

> "Apparently Congress intended a different rule to apply as between suits brought in federal courts (where the bank must be *established* in the district) and suits brought in state courts (where the bank need only be *located* in the county or city of the court having similar jurisdiction in similar cases). Otherwise, Congress hardly would have substituted 'located' for 'established' in defining venue of a suit brought in state court." App. A-3.

Although this reasoning has decisional support[14] it erroneously assumes that since the two words are different, the drafters must have intended that they have dichotomous meanings. In fact, in the realm of statutory construction, "[w]ords generally have different shades of meaning . . . ,"[15] and it is no more the rule that similar but different words must convey completely different thoughts within the context of a statute than it is the rule

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[13] *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J. concurring).

[14] *See Security Mills of Asheville, Inc. v. Wachovia Bank & Trust Co., supra*, 281 N.C. at 530, 189 S.E.2d at 266.

[15] *Puerto Rico v. Shell Co. (P.R.) Ltd., supra*, 302 U.S. at 258.

that the same word must always be construed as having the same meaning every place it is used within a statute.[16]

Therefore, it is unavailing to premise the interpretation of "established" and "located" upon the simplistic proposition that since they are different words, they have immutably different meanings which can be ascertained by mere lexical review. The words "established" and "located" are essentially neutral, noncommittal, geographical referents whose synonymity or dichotomy within 12 U.S.C. § 94 can only be discerned from their placement within and interrelationship with the remaining statutory language.

Thus, a more plausible explanation of the prima facie meaning of "established" and "located" in 12 U.S.C. § 94 is achieved if the analytical focal point is shifted from these words to the article "the" and the adjective "any" which clearly appear contradistinctively within the statute:

> "Actions and proceedings against *any* association under this chapter may be had in *any* district or Territorial court of the United States held within *the* district in which such association may be established, or in *any* State, county, or municipal court in *the* county or city in which said association is located having jurisdiction in similar cases." (Emphasis added)

The adjective "any" is used throughout 12 U.S.C. § 94 to suggest a potential plurality, whether of entities[17] or of courts,[18]

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[16] As noted by this Court in *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932):

> "It is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the legislature intended it should have in each instance."

[17] *viz.* "any association."

[18] *viz.* ". . . any district or territorial court," ". . . any state, county, or municipal court."

whereas the article "the" modifies nouns which are both in the singular[19] and denotative of a unique geographical situs.[20]

From the foregoing semantical and grammatical construction of 12 U.S.C. § 94, the conclusion can be drawn that had Congress intended to prescribe a plurality of districts, counties or cities in which a national bank could be "established" or "located," it would have substituted the adjective "any" for the article "the" as the modifier of "district" and "county or city"; or, at the very least, it would have employed plural nouns (*viz.* "districts," "counties or cities") in lieu of the singular. Instead, Congress envisioned federal suits being maintained only in *the* [one] district in which the association was established and state suits only in *the* [one] county or city in which it was located. The suit could be in *any* court within the city or county but not in *any* city or county.

C&S does not contend that the statutory language of 12 U.S.C. §94 alone preemptively validates its interpretative thesis; suffice it to say that the semantical analysis undertaken by the Court of Appeals is ill-suited to the statutory language which, at least on its face, appears to "locate" a national bank in only one county and city.

B. The Legislative History of 12 U.S.C. §94 Substantiates That a National Bank Is "located" Only in Its Home County.

As previously noted[21] the Court of Appeals completely overlooked the legislative history of 12 U.S.C. §94, with the exception of a casual notation that:

> "The original National Banking Act of 1863 did not

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[19] *viz.* "the district", "the county or city."

[20] The contrast between the usage of "any" and "the" is accentuated by the fact that the general reference to a plurality of judicial forums (*see* n. 18) consistently precedes, and is restricted by a specific geographical designation encompassing such forums. *See* n. 19.

[21] *See*, p. 10, *supra*.

make mention of suits against national banks in state courts. The provisions of the Act relating to suits in state courts were placed in the statute by later legislation." App. A-3.

Admittedly, the 1863 Act,[22] whether deliberately or by oversight, did not contain any provisions permitting suits against national banks in the state courts. Such suits were first authorized by Section 57 of the National Bank Act of 1864,[23] in the state, county and municipal courts where a national bank is "located." In interpreting that crucial word it should be remembered that Section 57 was not a schematically independent statute; rather it must be reconciled with the remainder of that Act. It is thus noteworthy that Section 6 of the 1864 Act required that a national bank's organization certificate designate the state, territory, or district and *the particular county* in which it operated.[24] Similarly, Section 8 of the Act additionally stipulated that a national bank's "usual business shall be transacted at an office or banking house located in *the place* specified in its organization certificate."[25] (emphasis added).

The upshot of these sections is that at the time Section 57 of the National Bank Act of 1864 was enacted, the activities of national banking associations were restricted by Sections 6 and 8 of the Act to *one* particular location. Not until the enactment of the McFadden Act of 1927[26] were national banks even

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[22] Act of February 25, 1863, ch. 58, 12 Stat. 665.

[23] Act of June 3, 1864, ch. 106, §57, 13 Stat. 99, 116-17, *as amended*, 12 U.S.C. §94 (1970).

[24] 13 Stat. 101 (1864), *as amended*, 12 U.S.C. §22 (1970).

[25] 13 Stat. 102 (1864), *as amended*, 12 U.S.C. §81 (1970).

[26] Act of February 25, 1977, ch. 191 §7, 44 Stat. 1228, *as amended*, 12 U.S.C. §36 (1970).

permitted to establish branches within their charter locations, and not until 1933 did Congress sanction national bank branches beyond the charter location.[27]

Because of the fact that in 1864 a national bank was permitted only one "location," namely the single place specified in its organization certificate, there is no statutory basis for interpreting the word "located" as having multi-county reference. The Court of Appeals' hypothesis that Congress deliberately chose that word to permit suits against national banks in any county in which they conducted branch banking can only be based upon the indefensible presumption that the Congress anticipated by some sixty years the advent of multi-county branch banking and formulated its statutory language accordingly.[28]

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[27] Act of June 16, 1933, ch. 89, §23, 48 Stat. 189-190, *as amended*, 12 U.S.C. §36 (1970).

[28] An alternative argument, overlooked by the Court of Appeals, which purportedly justifies a multi-county interpretation of "located" based upon legislative history, was succinctly formulated in *Central Bank v. Superior Court*, 30 Cal. App. 3d 962, 106 Cal. Rptr. 912 (1973). The argument derives from certain statutory modifications to [the predecessor of] 12 U.S.C. §§36 and 81, wrought by the McFadden Act (*see* n. 26, *supra*) which first sanctioned national bank branching and enlarged the "place of business" proviso of Section 8 of the 1864 National Bank Act (*see* n. 25, *supra*) to include bank branches as well as the original situs specified in the organization certificate. From these amendments, *Central Bank* concludes that, notwithstanding its phraseology, 12 U.S.C. §94 was intended to lay venue wherever the bank's "general business" was conducted, which by statutory extension, presently includes counties and districts encompassing branch banks.

Pretermitting the obvious strain on the statutory language (§A *supra*), this argument ignores the congressional emphasis upon the principal place of business specified in the *organization certificate* which, even under 12 U.S.C. §81, is geographically distinguished from legitimate branches maintained under 12 U.S.C. §36. Moreover, *Central Bank* neglects to consider that the McFadden Act modifications do not extend implicitly or explicitly to 12 U.S.C. §94. Thus:

> "The further argument that Congress did not intend to prohibit suit in the district where the branch bank was located, since such

C. **Prior Decisions of This Court Indicate That a National Bank Is "located" Only in Its Home County.**

The proposition that a national bank is "located" in all counties wherein it operates and maintains branches conducting general bank business is not only offensive to the purpose and legislative history of 12 U.S.C. §94,[29] but it also contravenes prior decisions of this Court. The most expansive of such decisions is the recent and oft-cited *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963). In *Langdeau*, two national banks chartered in Dallas County, Texas, were sued in Travis County in accordance with lenient state venue provisions. The Texas Supreme Court rejected those banks' 12 U.S.C. §94 defense on the alternative grounds that 12 U.S.C. §94 was "permissive" or that it had been impliedly repealed.[30] Reversing the Texas Supreme Court, this Court held that 12 U.S.C. §94 "must be given a mandatory reading," 371 U.S. at 562, and is

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branches were not authorized when the predecessor statutes to 12 U.S.C. §94 were passed, is fully answered by the failure of Congress, in the years since such branches were authorized to amend the venue provisions of the National Bank Act to enlarge them accordingly." *General Electric Credit Corp. v. James Talcott, Inc.*, 271 F. Supp. 699, 703 n.4 (S.D. N.Y. 1966).

Finally, since the enactment of the McFadden Act, Congress can scarcely have overlooked the judicial disharmony engendered by 12 U.S.C. §94 as well as other provisions of Title 12; indeed, as recently as 1959, Congress overhauled the national bank statutes by legislation which was prefaced by the following:

> An Act to amend the national banking laws to *clarify or eliminate ambiguities, to repeal certain laws which have become obsolete*, and for other purposes. Act of Sept. 8, 1959, Pub. L. No. 86-230, 73 Stat. 457 (emphasis added).

Since this legislative enactment did not modify the provisions of 12 U.S.C. §94, a logical inference can be drawn that the traditionally restrictive interpretation of 12 U.S.C. §94 remains viable.

[29] Discussed §B, *supra*.

[30] *Langdeau v. Republic National Bank*, 161 Tex. 349, 341 S.W. 2d 161 (1960), *rev'd sub nom. Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963).

"fully effective and must be recognized when [it is] duly raised." *Id.*, at 567. In rejecting the argument that 12 U.S.C. §94 was "permissive," the Court noted:

> "We would not lightly conclude that a congressional enactment has no purpose or function. We must strive to give appropriate meaning to each of the provisions of Title 12 and its predecessors. [citations omitted] Appellee, however, would have us hold that any state court could entertain a suit against a national bank so long as state jurisdictional and venue requirements were otherwise satisfied. *Such a ruling, of course, would render altogether meaningless a congressional enactment permitting suit to be brought in the bank's home county.* This we are unwilling to do, particularly in light of the history of § 57 . . . .
>
> All of the cases in this Court which have touched upon the issue here are in accord with our conclusion that national banks may be sued only in those state courts in *the* county where the banks are located." *Id.*, at 560-561 (emphasis added).

Langdeau evidences this Court's continuing affirmation that the word "located" in 12 U.S.C. §94 designates *the* county of suit as *the home county*. *See, First National Bank v. Morgan*, 132 U.S. 141 (1889). The phrase "home county" can have no other referent than the county specified in the bank's charter certificate; this fact implicitly entails the conclusion that a national bank cannot also be sued in any county wherein it operates branch banks. The *Langdeau* opinion, having issued some thirty years after the initiation of multi-county national bank branching[31] cannot be facilely dismissed as quaint 19th century obsolescence.[32]

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[31] *See* n. 26, *supra*.

[32] A common attack on the restrictive interpretation of 12 U.S.C. §94 is based upon the antiquity and alleged irrelevance of that statute in the twentieth century. *See, e.g., Holson v. Gosnell*, *supra*, 264 S.C. at 620, 216 S.E.2d at 540.

While there are two commonly acknowledged limitations on the scope of 12 U.S.C. §94, neither is relevant to the present case.[33] Furthermore, this Court has never countenanced interference with 12 U.S.C. §94 for any state "policy" reasons; it is solely "[t]he right of Congress to determine to what extent a state court shall be permitted to entertain actions against national banks and how far these institutions shall be subject to state control. . . ." *Van Reed v. People's National Bank*, 198 U.S. 554, 557 (1905). This congressional prerogative precludes, as a method of statutory construction, the Court of Appeals' effort to interpret 12 U.S.C. §94 "in harmony with the laws of venue of this state." App. A-4. *Van Reed* implicitly postulates, as a matter of basic federalism, that the harmony of federal and state statutes encompassing similar subject matter is irrelevant and that the state judiciary is neither empowered to arbitrate disparities between such statutes according to their

[33] The first limitation, restricting the applicability of 12 U.S.C. §94 to transitory actions, was initially validated in *Casey v. Adams*, 102 U.S. 66, 68 (1880) where the Court noted:

> "Local actions are in the nature of suits *in rem*, and are to be prosecuted where the thing on which they are founded is situated. To give the act [the predecessor to 12 U.S.C. §94] of Congress the construction now contended for would be in effect to declare that a national bank *could not be sued at all in a local action where the thing about which the suit was brought was not in the judicial district of the United States within which the bank was located.*" (partial emphasis added).

The *Casey* exception is nothing more than a logical incident of 12 U.S.C. §94: having specifically enacted a statute authorizing suits against national banking associations in both federal and state courts, Congress could hardly have intended its venue provision to completely preclude certain suits altogether. However meritorious or justifiable the *Casey* exception may be, it is immaterial to the resolution of this case; the Court of Appeals did not deem it necessary to consider how an action for conversion can remotely qualify as a "local" action.

The second limitation is not strictly an exception to the applicability or scope of 12 U.S.C. §94, but merely an exposition of the well-settled principle that 12 U.S.C. §94 venue, being a privilege, can be voluntarily waived if not timely raised as a defense. *First National Bank v. Morgan, supra.* Pre-litigation "presumptive" waiver by the maintenance of branch banks is discussed in §D, *infra.*

supposed relative merits, nor authorized to reformulate federal statutes in accordance with its own normative philosophy; "such a situation is a matter for Congress to consider." *Mercantile National Bank v. Langdeau, supra*, 371 U.S. at 563.

In short, this Court has consistently respected the restricted venue of 12 U.S.C. § 94, and has never sanctioned efforts to limit its effect for reasons of inconvenience to non-national bank litigants or for any other putatively desirable purposes. *See, Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976); *Michigan National Bank v. Robertson*, 372 U.S. 591 (1963); *Cope v. Anderson*, 331 U.S. 461 (1947).[34]

D. The Maintenance of Branch Banks Does Not Constitute a Waiver of 12 U.S.C. § 94.

The traditional concept of waiver, replete with manifold factual variations, is not before the Court in this case.[35] However, the concept of "presumptive" waiver[36] is an issue which is necessarily concomitant to the interpretation of "located" and must be resolved in order to preserve the efficacy of the Court's decision.

The courts have historically acknowledged that provisions of 12 U.S.C. § 94 afford a venue privilege which can be waived under certain circumstances[37] on the following theory:

> "Waiver is a voluntary and intentional relinquishment or

[34] As Mr. Justice Black stated in *Cope*, 331 U.S. at 467:

> "For jurisdictional purposes, a national bank is a 'citizen' of the state in which it is established or located, 28 U.S.C. §41(16), [current version at 28 U.S.C. §1348], and *in that district alone can it be sued*. 12 U.S.C. §94." (emphasis added).

[35] *See*, n. 8, *supra.*

[36] Discussed pp. 9-10, *supra.*

[37] *See, e.g., First National Bank v. Morgan*, 132 U.S. 141 (1889); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976).

abandonment of a known existing right or privilege, which, except for such waiver, would have been enjoyed. [citation omitted]. It may be expressed formally or it may be implied as a necessary consequence of the waiver's conduct inconsistent with an assertion of retention of the right. It must be proved by the party relying upon it. And if the only proof of intention to waive rests on what a party does or forebears to do, his act or omissions to act should be so manifestly consistent with and indicative of an intent to relinquish voluntarily a particular right that no other reasonable explanation of his conduct is possible." *Bufjam v. Chase National Bank*, 192 F.2d 58, 60-61 (7th Cir. 1951).

C&S has not "formally" waived its venue rights under 12 U.S.C. § 94 either by contract[38] or by appointment of a statutory agent for service of process.[39] Moreover, the record only substantiates that C&S maintains a place of business in DeKalb County (A. 7); a tenuous basis, at best, for invoking implied pre-litigation[40] waiver, the necessary elements of which have never been adequately determined, notwithstanding numerous decisions of this Court[41] which have been liberally cited as judicial precedent for all manner of waiver theories.

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[38] In *Michigan National Bank v. Robertson, supra*, 372 U.S. at 594, this Court intimated, but did not decide, that venue under 12 U.S.C. §94 may be waived by anticipatory contractual stipulation.

[39] *See* n. 41, *infra*.

[40] It has long been established that the venue provisions of 12 U.S.C. §94 can be waived ". . . by appearing [in an action] and making defense without claiming the immunity granted by Congress." *First National Bank v. Morgan, supra*, 132 U.S. at 145.

[41] 12 U.S.C. §94 waiver has been a subliminal issue, beyond the compass of actual decision, in various cases before this Court. *See, e.g., Michigan National Bank v. Robertson*, 372 U.S. 591 (1963); *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963); *National Bank of North America v. Associates of Obstetrics and Female Surgery, Inc.*, 425 U.S. 460 (1976); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976).

The advent of "presumptive" waiver signalled the demise of even token consideration of the crucial factors of "consent" and "voluntary relinquishment," in lieu of which was substituted a solitary and conclusive presumption:

> "If a national bank avails itself of a jurisdiction by setting up a branch to conduct general banking business, it has manifested an intent to be found in that jurisdiction for purposes of suits arising out of any business conducted there." *Lapinsohn v. Lewis Charles, Inc., supra*, 212 Pa. Super. at 193, 240 A.2d at 94-95.

Lapinsohn and its proponents[42] have compressed the multiple issues of waiver into a simplistic theory whose primary component is the physical emplacement of a branch bank. Care-

The decisional basis of several lower federal and state court cases finding "waiver" of 12 U.S.C. § 94, has frequently been *Neirbo Co. v. Bethlehem Ship Building Corp., Ltd.*, 308 U.S. 165 (1939), allegedly the definitive authority on waiver questions. *See Lapinsohn v. Lewis Charles, Inc.*, 212 Pa. Super. 185, 240 A.2d 90, *cert. denied* 393 U.S. 952 (1968); *Reaves v. Bank of America*, 352 F. Supp. 745 (S.D. Cal. 1973). In fact, *Neirbo* adjudicated certain waiver questions appertaining to 28 U.S.C. §112, the then-existing general federal venue statute, and held that the right of a corporation to be sued in the district of its residence could be waived by the consensual appointment of an agent for service of process in a foreign state. The limitations of *Neirbo* were noted in *Olberding v. Illinois Central Railroad Co., Inc.*, 346 U.S. 338 (1953), an action for intrastate damages caused by a non-resident motorist, where the Court held that the non-resident did not waive his venue rights under 28 U.S.C. §1391(a) by availing himself of the foreign state's highways in the absence of any *Neirbo*-type appointment of agent for service of process.

[42] *E.g., Security Mills of Asheville, Inc. v. Wachovia Bank & Trust Co.*, 281 N.C. 525, 189 S.E.2d 266 (1972); *Frankford Supply Co. v. Matteo*, 305 F. Supp. 794 (E.D. Pa. 1969); App. A-4.

fully worded,[43] and disguised in terms of manifestation of "intent", presumptive waiver is, in actuality, nothing more than a subtle method of infusing the erection of a branch bank with deleterious consequences prohibited by the language, history and purpose of 12 U.S.C. § 94. If the erection and maintenance of a branch bank in another county do not "locate" the national bank in that county under 12 U.S.C. § 94, it is a mere charade to propose that the erection of that same branch bank nullifies venue rights under 12 U.S.C. § 94 altogether; "[s]uch a ruling, of course, would render altogether meaningless a congressional enactment permitting suit to be brought in the bank's home county." *Mercantile National Bank v. Langdeau, supra,* 371 U.S. at 560.

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[43] The *Lapinsohn* argument is understandably phrased in terms of "setting up a branch" and "general banking business". However, even its marginal pretense to theoretical legitimacy would be dissipated, if *Lapinsohn* is construed as suggesting that waiver of venue by the transaction of business is a legal postulate peculiar to national banks. Assuming that it is not, there seems to be no reason why the *Lapinsohn* theory cannot be extended, in derogation of most state venue statutes (*e.g.*, Ga. Code Ann. §3-201), to ensnare any individual conducting general business without the county of his residence, although such a proposition would likely be judicial anathema.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Georgia Court of Appeals should be reversed with instructions that the Court of Appeals direct the trial court to enter an order dismissing the Complaint.

Respectfully submitted,

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OCTOBER TERM, 1976

NO. 76-398

THE CITIZENS AND SOUTHERN NATIONAL BANK,
Petitioner,

v.

NICK BOUGAS,
Respondent.

On Writ of Certiorari to the
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BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

SUMMARY OF ARGUMENT

It is a logical statutory interpretation, and does not usurp the legislative function of Congress, for this Court to hold that the opening and maintaining of a branch bank constitutes waiver of any venue privilege afforded to a national bank by 12 U.S.C. §94.

The statute does make a distinction between "established" and "located", and it is proper and logical for a state appellate court to find venué over a national bank in a county other than the one in which its charter was issued, provided the national bank has either established a branch or conducted business in that county.

ARGUMENT

Introduction

This case revolves around the questions of what actions on behalf of a national bank constitute waiver of the venue provisions of 12 U.S.C. §94, and where a national bank is located within the meaning of 12 U.S.C. §94.

1.

The first basis on which the decision of the Court of Appeals can be affirmed is that a national bank waives venue by the opening and operation of a branch bank in a county. This aspect was broached by the Court of Appeals in its decision, and it has been the premise on which the question has been decided in other jurisdictions. Lapinsohn v. Lewis Charles, Inc., 212 Pa. Super. 185, 240 A.2d 90, cert. denied 393 U.S. 952 (1968); Security Mills of Asheville, Inc. v. Wachovia Bank & Trust Co., 281 N.C. 525,

189 S.E.2d 266 (1972); Reeves v. Bank of America, 352 Fed. Supp. 745, (1973 D.C. Cal.); Frank furt Supply Co. v. Mateau, 320 Fed. Supp. 794. As to conducting business in a county constituting waiver, see Vann v. First National Bank, 324 So.2d 94 (Fla. App. 1976).

2.

The other basis on which the Court of Appeals' decision should be affirmed is that a national bank is located in any county in which it operates and maintains a branch. This rests on the provisions of the statute, 12 U.S.C. §94, which uses "located" rather than "established" in regard to suits in state courts. Security Mills of Asheville, Inc. v. Wachovia Bank and Trust Co.; (alternative holding) Holson v. Gosnell, 264 S.C. 619, 216 S.E.2d 539 (1975) cert. denied, 423 U.S. 1048 (1976); Central Bank v. Superior Court, 30 Cal. App. 3d 962, 106 Cal. Rptr. 912 (1973).

A. THE MAINTENANCE OF BRANCH BANKS DOES CONSTITUTE A WAIVER OF 12 U.S.C. §94 VENUE

As pointed out by petitioner in its Brief, the courts have historically acknowledged that the venue provisions of 12 U.S.C. §94 can be waived. The question for this Court to determine is what action or actions constitute waiver. Petitioner argues to the Court that a specific waiver would be required in each and every case in which suit was filed against petitioner or any other national bank and argues that venue is waived only by the national bank failing to raise what it contends is the venue privilege. Respondent contends that the knowing, intelligent business decision to open and maintain a branch bank to avail itself of business opportunities in that particular county constitutes a knowing assumption of responsibilities that flow with the opening and maintenance of the branch bank, such as the payment of taxes therein;

and constitutes a waiver of venue. This Court has long recognized that the benefits afforded by statute could be waived. First National Bank v. Morgan, 132 U.S. 141, 145 (1889). Respondent contends that the opening and maintenance of a branch bank constitutes a knowing waiver of 12 U.S.C. §94 venue by a national bank.

This Court has the authority and responsibility to reach a judicial determination as to what actions on behalf of the bank constitute waiver of venue under 12 U.S.C. §94. This function can be performed by this Honorable Court by statutory interpretation, without legislating. The social reasons why respondent's position should be adopted by the Court include: (1) the fact that justice is and will be denied to countless litigants because of the expense and practical considerations if the harsh interpretation advocated by petitioner is adopted by the Court; and (2) that national banks

should not be allowed to avail themselves of the protection provided by a forum's laws unilaterally. In this case, C&S had filed previous litigation involving some of the issues in this case in the State Court of DeKalb County, the forum in which this case is pending, and yet C&S is now asserting its interpretation of the venue statute to avoid the jurisdiction of that Court. As set forth by the author in "Waiver of Venue Under the National Bank Act: Preferential Treatment for National Banks", Iowa Law Review, Vol. 62/No. 1, page 129, it is the obligation of the judiciary, and not the Congress, to determine whether a national bank has waived its venue privilege.

B. A NATIONAL BANK IS "LOCATED" IN ANY COUNTY IN WHICH IT OPERATES AND MAINTAINS BRANCHES OR CONDUCTS BUSINESS

The question as to whether or not opening and maintaining a branch bank causes a national bank to be located within a particular county

other than the one in which its charter has been issued is related to what actions constitute a waiver of venue. But, based upon interpretation of the statute, the Court of Appeals' ruling and decision that a national bank can be established only in its district but located in any county in which it had established a branch bank or conducted business is not, as petitioner would contend, "fatally flawed in its analytic base", as there is a difference in the statutory language and scope of the matter. This is predicated in part on the fact that federal districts frequently encompass many counties and that the interpretation is one of state versus federal construction and application. 12 U.S.C. §94, for whatever reason, does contain a distinction in its language, using "established" in one place and "located" in another. The difference in the wording of the statute and the interpretation of "located"

has been the basis for decision in several state appellate courts. Bouqas v. The Citizens and Southern National Bank, 138 Ga. 706; Security Mills of Asheville, Inc. v. Wachovia Bank and Trust Co., supra.; Holson v. Gosnell, supra.; Central Bank v. Superior Court, supra.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision in the Georgia Court of Appeals should be affirmed.

Respectfully submitted,

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